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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-56

CLARENCE EDWARD NEVILLE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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(A) The District Court Refused To Define, In Any Manner, The Term "Major Parts";

(B) The Instruction, Given The Circumstances Of This Case, Permitted The Jurors To Convict Petitioner Even If They Believed His Theory Of Innocence, Because Of The Lack Of Guidelines As To What Constitutes "Major Parts" Of A Motor Vehicle;

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(B) The Highway Patrolman, Without Any Attempt To Obtain Judicial Approval, Seized The Trucks, Transported Them From The Auction Premises, Held Them Impounded, Inspected Them, Invited Numerous Civilians And Other Law Enforcement Officers To Inspect Them, Disassembled Parts From Them, Scratched Paint From Them, Etc., And Subsequently Introduced Evidence Derived From The Seizure At A Trial On Charges Filed Ten Months After The Seizure 14

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CLARENCE EDWARD NEVILLE,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Clarence Edward Neville, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 20, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. No opinion was rendered by the District Court for the Eastern District of Missouri.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 20, 1975. A timely petition for rehearing with *en banc* suggestion was denied on June 11, 1975, and this petition for certiorari was filed within thirty days of that date. The Court of Appeals, on June 17, 1975, entered an order staying the mandate pending application for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court's instruction, permitting the jury to find petitioner guilty of transporting stolen vehicles if the "major parts" of a stolen vehicle were found to have been combined with parts of one or more other legitimately acquired motor vehicles into one rebuilt motor vehicle, is prejudicial error where:
   (A) The District Court refused to define, in any manner, the term "major parts";
   (B) The instruction, given the circumstances of this case, permitted the jurors to convict petitioner even if they believed his theory of innocence, because of the lack of guidelines as to what constitutes "major parts" of a motor vehicle;

   (C) The instruction given in this case conflicts squarely with the law of other circuits?

2. Whether petitioner's fourth amendment rights were violated by a Missouri highway patrolman's warrantless seizure of four trucks petitioner had consigned to a St. Louis Auto Auction, where:
   (A) The trucks were secure in the possession of the auction, and were thereby effectively immobilized;
   (B) The highway patrolman, without any attempt to obtain judicial approval, seized the trucks, transported them from the auction premises, held them impounded, inspected them, invited numerous civilians and other law enforcement officers to inspect them, disassembled parts from them, scratched paint from them, etc., and subsequently introduced evidence derived from the seizure at a trial on charges filed ten months after the seizure?

3. Whether the admission, in this federal trial, of evidence procured by Illinois state law enforcement officers through illegal eavesdropping and wiretapping, violated petitioner's due process rights and the Fourth, Ninth, and Tenth Amendments, where the Illinois law enforcement officers committed a crime in procuring the evidence contrary to explicit Illinois statutory prohibition?

4. Whether, where possession of recently allegedly stolen property is *explained,* an instruction permitting an inference of knowledge to be drawn from possession of recently stolen property should be given, and whether the holding below conflicts with that of other circuits concerning the constitutional propriety of such an instruction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution; Title 18, United States Code, Sections 2311, 2312, 2516(2), 2518(7) and 3231; Illinois Revised Statutes, Chapter 38, Sections 14-1(b), 14-2(a) and 14-4; and Missouri Revised Statutes, Section 301.390 are involved herein and are set forth in Appendix D.

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner Clarence Edward Neville was indicted on seven counts in the United States District Court for the Eastern District of Missouri for violations of the Dyer Act, 18 U.S.C. §2312 (1970). Each count concerns a separate allegedly stolen truck. Following a jury trial, the petitioner was convicted and sentenced to concurrent terms of five years in prison on counts 1, 3, 5, 6 and 7; and to five years imprisonment on counts 2 and 4, consecutive to the other counts but concurrent with each other, for an aggregate of ten years, and fined $35,000.00. On appeal, because of the form of sentence, the Court of Appeals considered the sufficiency of evidence only as to Counts 1 and 2.

B. The Evidence

Petitioner owns and operates Neville Auto Sales, a salvage yard and rebuilding operation in Springfield, Illinois, covering forty-eight acres (Tr. 1186).

Generally, petitioner buys, by check, a wrecked truck from an insurance pound or other salvage dealers, obtaining title to the salvage truck. Petitioner also purchases vast quantities of used and salvage parts at bulk sales and auctions, which comprise his inventory. He then replaces the wrecked cab, box, bed and front end with used replacements in good condition drawn from his inventory. The engines, transmissions and major running parts of the salvage trucks generally are in working order and remain in the rebuilt trucks, unless replaced from petitioner's inventory of used parts. Petitioner then paints, cleans and repairs the rebuilt trucks as required and sells them at auction or at his own place of business.

Petitioner installs the Vehicle Identification Number plate of the salvage truck on the door of the replacement cab, as the major parts correspond to those of the salvage truck. Accordingly, title to the rebuilt truck is under the salvage truck's I.D. number.

It is uncontested that Neville Auto Sales submitted the seven rebuilt trucks to a Missouri auto auction for sale to dealers and the public. The three trucks comprising the last three counts of the indictment were sold at the auction on March 9, 1973 (Tr. 377).

The four trucks comprising the first four counts of the indictment were examined at the auction by a Missouri highway patrolman, seized without warrant, and retained for inspection over a ten-month period.

The proof was similar as to each of the seven trucks. The evidence presented at trial falls into three general categories.

CATEGORY OF PROOF: (I)

Certain non-running, non-major parts of each of petitioner's rebuilt trucks were identified by persons who had owned trucks that had been stolen from them. These witnesses were unable to identify major, running parts. Petitioner accounted for the legal acquisition of the major running parts.

These seven prior owners of trucks had been chosen by state police from law enforcement agency lists of stolen vehicles (Tr. 487). For all but the Count 2 truck, these witnesses testified that they had viewed one of the trucks and were able to identify certain non-running, non-major parts. They were in each case unable to identify the majority of running, major parts. Petitioner accounted for the legal acquisition of the major running parts. [See CATEGORY OF PROOF (III), below.] The Count 2 truck at no time was viewed by an alleged prior owner (Tr. 495-97, 870). The parts identified and those that remain unidentified as to each truck are as follows:

Truck	Parts Identified	Parts Witnesses Testified They Were Unable to Identify
COUNT 1	Improperly closing door, drilled holes, wiring, left taillight, smudge on door, child's boat (Tr. 822-23).	Engine, differential, steering mechanism, brakes, front suspension, rear end, frame, bumper (Tr. 479, 824-34).
COUNT 2	Repainted cab top (Tr. 493-94).	Engine, frame (Tr. 495-97).
COUNT 3	Drilled holes, alternating back-up lights, tailpipe extension, horn wire and hole, front seat stain, a shock absorber, dents and scratches (Tr. 868-72).	Engine, transmission, steering wheel, brake and drum assembly, suspension unit, front end springs, air conditioner compressor, tires, wheels, frame, bumper (Tr. 635-40, 877-90).
COUNT 4	A piece of tape, tailpipe modification, strip of caulking on door, paint on bumper, creosote in bed, dents (Tr. 904-07).	Engine, transmission, differential, steering unit, suspension unit, front end housing, rear end, wheel housing, wheels, tires, frame (Tr. 643-45, 905-19).
COUNT 5	Filled dent in hood, drilled holes, missing seat belt emblems, glue on dashboard, hood discoloration, key for glove compartment, drug store receipt (Tr. 922-27).	Engine, differential, steering wheel, brake drums, springs, front end assembly, top of the cab, rear end, wheel housing, grill work, frame, bumper (Tr. 434-36, 922-46).
COUNT 6	Wax under hood, tailgate insulation, wiring on underside of hood, holes in bed rail, scratches on tailgate, paint on dash (Tr. 957-61).	Engine, transmission, differential, steering wheel, power steering unit, brake assembly, power brake unit, front end assembly, rear springs, rear end, compressor, wheels, wheel housing, tires, frame, radio (Tr. 660-66, 960-73).
COUNT 7	Drilled holes in bed and side of cab, dash and step bumper, worn spot on hood, wiring on sunvisor, turned antenna (Tr. 976-88).	Engine, transmission, power brake unit, brake assembly, drum housing, brakes, front end assembly, front springs, leaf springs, air conditioner, frame, tires (Tr. 672-77, 990-95).

Summarizing the above table, certain minor portions or contents of the cabs and beds[1] or modifications thereto were identified by these government witnesses. None were able to identify positively any major parts of any of the trucks. Petitioner accounted for the legal acquisition of the major running parts.

CATEGORY OF PROOF: (II)

The Government showed certain parts of petitioner's rebuilt trucks were similar to those of stolen trucks, but could not positively identify these parts as stolen.

This was circumstantial evidence, in the form of testimony by the Missouri highway patrolman, concerning similar engine sizes, paint colors, models, options and model years (Tr. 398-402, 454, 463, 476, 480, 493-94, 501-02, 513-14, 525-29, 535-42, 543-45). None of this evidence was conclusive or constituted positive identification.

[1] For the information of automotive laymen, as were the jurors, it might be well to define the terms "cab" and "bed", which were used frequently at trial. The "cab" is the enclosed compartment on a pick-up truck having a windshield at the front and seats for the driver. The term "bed" refers primarily in the sense used at trial to the box on a pick-up truck used for carrying goods.

CATEGORY OF PROOF: (III)

Petitioner Neville accounted for the lawful acquisition and use in the rebuilding process of the major and running parts of each of the seven rebuilt trucks.

It was uncontested that petitioner Neville held legal title to the salvage trucks that constitute the foundations of the rebuilt trucks. The government itself proved these facts (Tr. 130, 172, 198, 212-16, 244-46, 251-55, 286-90, 296-305, 319-20, 333-40).

Petitioner rebuilt all but the Count 1 truck, which he took in trade from a party known to him, who he had some months before helped procure a bank loan on the same truck (Tr. 1183, 1199-1204). This testimony was corroborated by the bank's assistant cashier.

As to each of the Count 2-7 trucks, petitioner explained his rebuilding process (Tr. 1205-1208, 1224-27, 1238-39, 1241-42, 1243-44, 1244-47).

Petitioner's inventory of cabs, beds and other used parts in good condition is acquired primarily through bulk purchases (Tr. 1188-91). Petitioner proved various bulk purchases across the United States in which he had bought large quantities of salvage truck parts (Tr. 1253-57). Several witnesses testified to the extensive quantity of used parts in inventory at petitioner's salvage yard (Tr. 1120, 1137, 1142). Witnesses testified they had seen petitioner rebuild trucks (Tr. 1137, 1148). One witness testified to having seen petitioner buy four to five hundred salvage trucks at one auction (Tr. 1156-57), and testified that Neville Auto Parts is the largest salvage truck dealer in central Illinois (Tr. 1157).

C. An Uncorroborated, Impeached Witness

Harold Stewart, a convict whose major source of income over the past fourteen years has been derived from stealing motor vehicles (Tr. 718), testified that he had participated with petitioner in alleged uncharged acts concerning unspecified vehicles (Tr. 721-22). He also claimed to have knowledge that parts of the Count 1 and Count 3 trucks were stolen (Tr. 739-40). He was impeached on cross-examination (Tr. 761-70, 1031, 1045-46, 1050-51, 1055). Petitioner explicitly denied the truth of Stewart's testimony (Tr. 1211-21).

D. Eavesdropping Evidence

In rebuttal, over objection, Decatur, Illinois Police Officer Donald Brooks testified concerning portions of a telephone conversation between petitioner and Stewart. Brooks had overheard this conversation while in Stewart's home on December 2, 1973.

E. The Seizure of Four Trucks

On April 20, 1973, the Missouri highway patrolman seized and impounded for ten months, without search warrant, the Counts 1-4 trucks from a Missouri auto auction. He had inspected them pursuant to the auction's request, but had no knowledge they were stolen (Tr. 4-14). He observed what he thought to be indicators causing him to become suspicious, but also noted that the vehicle identification numbers on the trucks matched the titles (Tr. 11-12). He questioned petitioner, who was present at the auction, and testified that he did not suspect petitioner of the theft of the trucks (Tr. 26-27).

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT'S INSTRUCTION, PERMITTING THE JURY TO FIND PETITIONER GUILTY OF TRANSPORTING STOLEN VEHICLES IF THE "MAJOR PARTS" OF A STOLEN VEHICLE WERE FOUND TO HAVE BEEN COMBINED WITH PARTS OF ONE OR MORE OTHER LEGITIMATELY ACQUIRED MOTOR VEHICLES INTO ONE REBUILT MOTOR VEHICLE, IS PREJUDICIAL ERROR WHERE:

(A) THE DISTRICT COURT REFUSED TO DEFINE, IN ANY MANNER, THE TERM "MAJOR PARTS";

(B) THE INSTRUCTION, GIVEN THE CIRCUMSTANCES OF THIS CASE, PERMITTED THE JURORS TO CONVICT PETITIONER EVEN IF THEY BELIEVED HIS THEORY OF INNOCENCE, BECAUSE OF THE LACK OF GUIDELINES AS TO WHAT CONSTITUTES "MAJOR PARTS" OF A MOTOR VEHICLE;

(C) THE INSTRUCTION GIVEN IN THIS CASE CONFLICTS SQUARELY WITH THE LAW OF OTHER CIRCUITS.

As a result of the refusal of the District Court to define "major parts" *in any manner* (Tr. 1231, 1417), in the circumstances of this case, the law, in effect, was whatever the jury decided it to be. The jurors were allowed to create law to fit the facts.

Petitioner Neville, a volume salvage truck dealer, accounted for the lawful acquisition of the frames, foundations and running parts of the seven rebuilt trucks. The government generally proved certain minor, non-running parts and contents of the cabs and beds of the rebuilt trucks to have emanated from stolen trucks. Petitioner Neville proved that he buys huge quantities of truck parts and

bodies in bulk sales from legitimate dealers across the United States. It certainly is possible that the allegedly stolen parts were sold to petitioner, without his knowledge of their stolen nature, as part of these bulk acquisitions.

In the circumstances of this case, the jurors could have believed petitioner's account in entirety and still have been compelled to find him guilty because they believed that minor parts of cabs, beds and boxes (all non-running parts) comprised "major parts" of a truck. It is impossible to discern the meaning of the verdict because of the erroneous instruction.

Petitioner recognizes that convictions under the Dyer Act have been held to be proper where major parts of a motor vehicle in question are stolen, although the 18 U.S.C. § 2311 definition of "motor vehicle" makes no reference to "major parts" as falling within the prohibition. Petitioner seeks no loophole in Congress' effort, through the Dyer Act, to curb auto theft. *cf. United States* v. *Turley,* 352 U.S. 407 (1957).

Petitioner does, however, urge this Court to consider how far the instant case strays from accepted notions of the meaning of "motor vehicle". *cf. McBoyle* v. *United States,* 283 U.S. 25 (1931).

In the other cases in which similar situations have arisen concerning rebuilt motor vehicles, other courts have proceeded differently and with utmost caution. In *United States* v. *Bishop,* 434 F.2d 1284 (6th Cir. 1970), while the court was able to affirm the conviction because the evidence was sufficient to show that the entire motor vehicle was transported interstate and thereafter split into two pieces found near each other, the court mandated a "major parts" instruction given in *United States* v. *Wallace,* 254 F. Supp.

653 (E.D. Tenn. 1965), *aff'd* 361 F. 2d 494 (6th Cir. 1966). **This Sixth Circuit instruction requires the court to charge the jury that a "motor vehicle" must have "an engine, frame and wheels," and "that the body does not constitute a motor vehicle" within the intendment of the Dyer Act.** (434 F. 2d at 1288). *See also United States* v. *Wooten,* 239 F. Supp. 123 (E.D. Tenn. 1965); *United States* v. *Lofty,* 455 F. 2d 506 (4th Cir. 1972) (truck trailer not a "motor vehicle," but "goods"); *United States* v. *Casey,* 428 F. 2d 229 (5th Cir. 1970), *cert. denied* 400 U.S. 839 (held: the fact that parts of a stolen vehicle were found in an automobile in which defendant was riding was insufficient to support the conviction of interstate transportation of a motor vehicle). The Eighth Circuit Court of Appeals in this case implicitly recognized the important conflict that exists concerning "major parts" instructions by its grant to petitioner of a stay of mandate.

In direct conflict with the Sixth Circuit's holdings, the Eighth Circuit in the instant case has approved an instruction that allows the jury to decide for itself what constitutes "major parts" of a motor vehicle within the intendment of the Dyer Act. The Eighth Circuit of Appeals below expressed its fear that the jury would be confused by guidelines as to what constitutes "major parts." Petitioner contends, on the contrary, that the jury was confused by the *total lack* of guidelines. Moreover, it is impossible to discern whether, in fact, the jurors found petitioner guilty based on non-major, non-running parts, or whether they disbelieved his account of his lawful acquisition of the major-running parts of each rebuilt vehicle. Therefore, the instruction given effectively vitiated petitioner's defense to the charges.

Petitioner prays this Court to resolve the important conflict between the circuits and set forth guidelines concerning the propriety and contents of "major parts" instructions in Dyer Act prosecutions.

II.

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY A MISSOURI HIGHWAY PATROLMAN'S WARRANTLESS SEIZURE OF FOUR TRUCKS PETITIONER HAD CONSIGNED TO A ST. LOUIS AUTO AUCTION, WHERE:

(A) THE TRUCKS WERE SECURE IN THE POSSESSION OF THE AUCTION, AND WERE THEREBY EFFECTIVELY IMMOBILIZED;

(B) THE HIGHWAY PATROLMAN, WITHOUT ANY ATTEMPT TO OBTAIN JUDICIAL APPROVAL, SEIZED THE TRUCKS, TRANSPORTED THEM FROM THE AUCTION PREMISES, HELD THEM IMPOUNDED, INSPECTED THEM, INVITED NUMEROUS CIVILIANS AND OTHER LAW ENFORCEMENT OFFICERS TO INSPECT THEM, DISASSEMBLED PARTS FROM THEM, SCRATCHED PAINT FROM THEM, ETC., AND SUBSEQUENTLY INTRODUCED EVIDENCE DERIVED FROM THE SEIZURE AT A TRIAL ON CHARGES FILED TEN MONTHS AFTER THE SEIZURE.

The Missouri highway patrolman, by seizing these vehicles, exceeded the scope of his lawful authority and exceeded any authority the auction owner could have purported to impute to him. Petitioner does not contest that the patrolman, at the request of the auction owner to whom the trucks had been consigned for the purpose of sale, had authority to inspect the trucks. Petitioner contends that, pursuant to that initial inspection, even if the patrolman observed facts that constituted probable cause for his belief that the trucks were stolen, the seizure and impound-

ment of the trucks could not lawfully be accomplished without judicial process.

There was no showing by the Government that there was any threat of the trucks being moved from the auction premises, which was secure, guarded, locked and under the control of an impartial third party. This Court has held consistently that the "general requirement that a warrant be obtained is basic to the Amendment's protection of privacy, and the burden is on those seeking [an] exception to show the need for it." *Chimel* v. *California*, 395 U.S. 752, 762 (1969). The Government failed to meet that burden in the instant case.

The Court of Appeals below has cited only (in *cf.* form) *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). Petitioner contends that the *Chambers* decision cannot support this seizure. The panel notes its opinion that the patrolman acted pursuant to Missouri statutory authority. Petitioner respectfully submits that the Missouri statute cannot be read to authorize this conduct, and further that if it can be so read it is unconstitutional. The portion of the statute omitted in the Court of Appeals' Opinion explicitly requires the peace officer to immediately commence judicial process.[2]

Recently, in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), this Court distinguished its holding therein from *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), noting that the *Coolidge* search was extensive. The seizure and subsequent inspection in the instant case far exceeds the scope of permissible activity defined in *Cardwell*.

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[2] Missouri Revised Statutes, Section 301.390: set forth in Appendix D hereto.

III.

THE ADMISSION, IN THIS FEDERAL TRIAL, OF EVIDENCE PROCURED BY ILLINOIS STATE LAW ENFORCEMENT OFFICERS THROUGH ILLEGAL EAVESDROPPING AND WIRETAPPING, VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS AND THE FOURTH, NINTH AND TENTH AMENDMENTS, WHERE THE ILLINOIS LAW ENFORCEMENT OFFICERS COMMITTED A CRIME IN PROCURING THE EVIDENCE CONTRARY TO EXPLICIT ILLINOIS STATUTORY PROHIBITION.

The Illinois Revised Statutes[3] prohibit any person, including a law enforcement officer, from eavesdropping unless he does so with the consent of one party to the conversation *and* at the request of a State's Attorney. A violation of these statutes carries with it criminal and civil liability. The Illinois Supreme Court recently upheld this requirement in *People* v. *Richardson,* 328 N.E.2d 260 (S.C. Ill. 1975).

In the instant case, the Government not only used transcripts of unlawfully monitored conversations between Petitioner and witness Stewart, but called a Decatur, Illinois Police Officer to testify concerning a conversation he overheard.

It has long been recognized that, consistent with the Ninth and Tenth Amendments, persons are citizens of both the United States and the state in which they reside. Both may enact criminal statutes for mutual protection unless Congress has otherwise provided. *Gilbert* v. *Minnesota,* 254 U.S. 325 (1920). In the area of eavesdropping, the federal statute welcomes state legislation. 18 U.S.C. §§ 2516 (2), 2518(7). *See especially* 18 U.S.C. §3231.

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3 Illinois Revised Statutes, Chapter 38, Sections 14-1(b), 14-2(a) and 14-4: set forth in Appendix D hereto.

The question thus posed is whether the federal government can use, in federal prosecutions, evidence and the fruits thereof obtained by the criminal activity of state agents. Petitioner vigorously contends it cannot, since the power to create authorization procedures is reserved to the states and such procedures are permitted to be more stringent than federal rules. *Senate Report,* No. 1097, 90th Cong., 2d Sess., at 98; *Cooper* v. *California,* 386 U.S. 58, 62 (1967); *cf. Lee* v. *Florida,* 392 U.S. 378 (1968); *Rea* v. *United States,* 350 U.S. 214 (1956).

IV.

WHERE POSSESSION OF RECENTLY ALLEGEDLY STOLEN PROPERTY IS EXPLAINED, NO INSTRUCTION PERMITTING AN INFERENCE OF KNOWLEDGE TO BE DRAWN FROM POSSESSION OF RECENTLY STOLEN PROPERTY SHOULD BE GIVEN, AND THE HOLDING BELOW CONFLICTS WITH THAT OF OTHER CIRCUITS CONCERNING THE CONSTITUTIONAL PROPRIETY OF SUCH AN INSTRUCTION.

The Court of Appeals recognized that petitioner "is an experienced automobile and truck salvage dealer and rebuilder who has operated for fifteen years in the Springfield, Illinois, area. He concentrates on late model trucks and carries a large inventory of new and used parts and used trucks."

Petitioner's defense, as reviewed above in the Statement of the Case, consisted in large part of his explanation of the lawful acquisition of salvage trucks and parts. He buys large quantities of salvage, pays with checks, and titles trucks in his own name. Certainly this is adequate explanation of his unknowing possession of stolen parts.

In the instant case, the instruction allowing the jury to infer petitioner's knowledge that parts incorporated in the rebuilt trucks were allegedly stolen had the effect of converting petitioner's exculpatory testimony in his defense into inculpatory statements. The Eighth Circuit Court of Appeals' holding below conflicts with the holdings of the First and District of Columbia Circuits. *Goodman* v. *United States,* 362 F.2d 965 (D.C. Cir. 1966); *Freije* v. *United States,* 386 F.2d 408 (1st Cir. 1967). *See also United States* v. *Casey,* 428 F.2d 229 (5th Cir. 1970). This Court's recent holding in *Barnes* v. *United States,* 412 U.S. 837 (1973) is not read by petitioner as authorizing the instruction's constitutionality in the circumstances of the instant case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1708

UNITED STATES OF AMERICA,
Appellee,
vs.
CLARENCE EDWARD NEVILLE,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 31, 1975
Filed: May 20, 1975

Before GIBSON, Chief Judge, LAY, and Ross, Circuit Judges.

GIBSON, Chief Judge.

Defendant Clarence Edward Neville appeals his jury convictions on seven counts for violations of the Dyer Act.[1]

[1] 18 U.S.C. § 2312 (1970). That section reads:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

He was sentenced by the District Court[2] to concurrent terms of five years in prison on counts 1, 3, 5, 6 and 7 and to five years imprisonment on counts 2 and 4, consecutive to the other counts but concurrent with each other, for an aggregate of ten years, and fined $35,000.

On appeal the defendant challenges (1) the court's instruction permitting the jury to convict him for knowingly transporting rebuilt trucks containing undefined "major parts" of stolen vehicles; (2) the sufficiency of the evidence to identify the stolen trucks, to prove they were "motor vehicles," or to prove defendant's knowledge that they were stolen; (3) the court's instruction permitting the jury to infer guilty knowledge from defendant's unexplained possession of recently stolen property; (4) the admission of evidence of other crimes; and (5) the admission of evidence allegedly obtained unconstitutionally. We affirm.

Neville is an experienced automobile and truck salvage dealer and rebuilder who has operated for fifteen years in the Springfield, Illinois, area. He concentrates on late model trucks and carries a large inventory of new and used parts and used trucks. In March and April of 1973 he attempted to sell through a St. Louis auto auction seven stolen pickup trucks disguised to appear as used vehicles legitimately titled. A total of fourteen trucks were involved in the scheme. Seven "clean" trucks were legally obtained by Neville—one purchased new through an accomplice, the other six in wrecked condition. He removed their factory marked frames and all other identification markings and transferred them to seven stolen trucks whose frames

[2] The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, passed sentence September 13, 1974.

and identification markings he had removed and destroyed. He and his employees then drove four of the trucks from Illinois to St. Louis, Missouri, and consigned them to the Floyd Hauhe Auto Auction for sale.

The auction company guarantees title to all trucks sold by it and reserves the right to inspect the vehicles before they are sold. Suspicious of the legitimacy of the titles to the trucks, the manager of the auction contacted the Missouri State Highway Patrol. On April 20, 1973, Sergeant Mudd of the Missouri State Highway Patrol received the keys and titles to the four late model trucks and proceeded to inspect them.

Inspection revealed that the frames (which contain confidential or hidden identification numbers) had all been changed. Also, the federal warranty sticker was missing on each truck, even though one truck showed only 594 miles on its odometer. The trucks were seized and subsequent investigation revealed them to be stolen trucks disguised with lawfully obtained frames and markings. Three other stolen trucks previously sold by Neville through the auction in March, 1973, were similarly traced.

Neville claimed to have purchased six of the seven trucks in wrecked condition and rebuilt them for sale. The seventh he claimed to have received in trade. All seven appeared to be lawfully registered in Neville's name but none showed any signs of repair or body work; none was properly identified with all factory and registration markings; none matched the description of the original truck registered with the same identification numbers; and two of the seven carried no identification numbers at all. At trial the owners of six of the seven stolen trucks positively identified them as their own, and government witness Harold Stewart,

Neville's accomplice, admitted stealing the remaining truck and delivering it to Neville in 1972.

I. The defendant's primary challenge is to the court's instruction permitting the jury to convict as to each count if it found that the defendant transported rebuilt trucks in interstate commerce knowing that they had been reconstituted by combining the "major parts" of stolen vehicles with parts of other vehicles.[3] Relying on *United States* v. *Bishop,* 434 F.2d 1284 (6th Cir. 1970), and *United States* v. *Wallace,* 361 F.2d 494 (6th Cir. 1966), defendant argues that he was prejudiced by the court's failure to define "major parts" to guide the jury in determining whether the trucks Neville was accused of transporting contained

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[3] The court instructed the jury in pertinent part as follows:

> The term "motor vehicle" includes an automobile, truck, or any self-propelled vehicle designed for running on land but not on rails.
>
> • • •
>
> It is an essential element of the crime charged that the pickup trucks involved had been "stolen." In determining whether the pickup trucks had been stolen, the Court instructs the Jury that whenever one person's motor vehicle is acquired or is thereafter possessed • • • with the intent to deprive the owner of the right and benefits of ownership, such motor vehicle is "stolen" as that term is used in these instructions.
>
> In this connection you are instructed that *if you find as to any count that the motor vehicle described therein was stolen and that thereafter the major parts of said stolen motor vehicle were combined with the major parts of one or more other motor vehicles into one rebuilt motor vehicle which was thereafter transported in interstate commerce, then you may find that the rebuilt motor vehicle is the stolen motor vehicle described* in said count which the defendant is charged with transporting • • •. (Emphasis added.)

the requisite stolen parts to constitute them stolen "motor vehicles" within the meaning of the Act.

18 U.S.C. § 2311 (1970) provides that "motor vehicle includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails." "Major parts," however, are not independently defined in the Act. The District Court's charge to the jury tracked the statutory definition of "motor vehicles," but did not independently define or list their "major parts." The Government submits, and we agree, that no further definition of the term "major parts" is required. It is sufficient to show under the statute "that only some of the major parts of the vehicle in question were stolen." *United States* v. *Stettmeier,* 465 F.2d 436, 437 (9th Cir. 1972) (major parts of stolen aircraft). Once the trial judge delivers a legally accurate jury charge, as here, "the extent of its amplification must rest largely in his discretion." *United States* v. *Bayer,* 331 U.S. 532, 536 (1947). We find no evidence that the jury misunderstood the charge and no abuse of discretion in this case.

"Major parts" is a commonly used conversational term without a technical meaning in this statutory context; it is not a word of art. Its meaning is within the jury's knowledge and experience and need not be explained. Indeed, as we have recognized in other contexts, to indulge in variations of statement in order to define otherwise understandable language might well confuse as much as help the jury. *Guon* v. *United States,* 285 F.2d 140, 142 (8th Cir. 1960). Moreover, excessive definitions of secondary, nonstatutory concepts might often because of imprecise language contain technical deficiencies that for lack of completeness would enable criminals to argue compliance with

the definition, though in actuality violating the statute and its spirit.[4]

On the contrary, the Dyer Act is not to be construed so narrowly as to disregard the paramount congressional purpose of curbing commercial interstate traffic in stolen motor vehicles. *See United States* v. *Turley,* 352 U.S. 407, 413-14 (1957). Without "major parts" of a vehicle being encompassed within the definition of "motor vehicles," enforcement of the Act might be foreclosed simply whenever a thief swaps stolen parts before being caught. We believe Congress intended no such impediment to enforcement. *United States* v. *Stettmeier, supra* at 437.

In this case we are far from a marginal situation in which only one major part, *i.e.,* a set of wheels, is proved to be stolen. Here, the subject vehicles themselves were all proved stolen and identified. The basic changes made by the defendant on the stolen vehicles were some repainting and substitution of the frames and clean identification plates and numbers of totally wrecked vehicles. Titles from the wrecked vehicles were then used to merchandise the stolen vehicles. Such an obvious loophole need not be provided for fences and dealers in stolen vehicles. The authorities cited by the defendant do not hold to the contrary.[5]

[4] In many situations a comprehensive definition is impossible to fashion:

> Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and overdefinition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling.

3 J. Stephens, *A History of the Criminal Law in England* 305-06 (1883).

II. Neville also challenges the sufficiency of the evidence to identify the stolen trucks, to prove they were "motor vehicles," and to prove his knowledge that they were stolen. However, after a careful review of the record in a light most favorable to the Government, granting it the benefit

[5] In *United States* v. *Bishop,* 434 F.2d 1284 (6th Cir. 1970), the Sixth Circuit affirmed a Dyer Act conviction for transporting a stolen auto from Ohio to Kentucky. Although the auto was disassembled when finally discovered by federal agents, all of its major parts were found near the defendant's Kentucky home. He admitted carrying the engine block across the state line but claimed to have purchased it. The court noted that:

> [The Act only] makes unlawful the transportation of a "motor vehicle." It does not separately make unlawful the transportation of one of the parts of such a vehicle, knowing it to have been stolen. • • • Even considering the broad congressional purposes of the Dyer Act, • • • it cannot be said that an engine block taken by itself may be fairly encompassed within the wording of [the Act].

434 F.2d at 1287.

The court held, however, that the evidence as a whole was sufficient for the jury to find the defendant guilty and approved the inference from his admitted possession of the engine block that he was a party to the interstate transportation of the entire stolen vehicle.

In *United States* v. *Wallace,* 361 F.2d 494 (6th Cir. 1966), four years before *Bishop,* the same court summarily affirmed a conviction for the theft and transportation of a reconstituted auto whose major parts were stolen. Appellant Wallace's counsel did not appear for argument. The trial court's opinion recounts the jury instruction that a "motor vehicle" must have an engine, frame and wheels capable of travelling on land and that the body alone is not a "motor vehicle" within that definition. The court of appeals, however, did not comment on the charge or otherwise require a definition of "major parts" as part of the jury charge. *United States* v. *Wallace,* 354 F.Supp. 653, 654 (E.D.Tenn. 1965), *aff'd,* 361 F.2d 494 (6th Cir. 1966).

of all factual inferences, *Whiteside* v. *United States,* 346 F.2d 500, 502 (8th Cir.), *cert. denied,* 384 U.S. 1023 (1965), we conclude that there was not only substantial, but overwhelming, evidence to support the verdict. *Moody* v. *United States,* 477 F.2d 548 (8th Cir. 1973).

The first count of the indictment concerned a red 1973 Chevrolet pickup containing a V-8 engine and most available options. Its coded identification number and warranty card, however, indicated that it should have contained only a six cylinder engine and very few optional features. A truck of that description, orange in color, bearing the same identification number, had in fact been purchased from a St. Louis dealer by one Evans in December, 1972. Neville claimed he obtained it from Evans in a trade.

Harold Stewart, however, testified that Neville admitted he and Evans stole the fully equipped red truck and replaced its frame and identifiable parts with those from the less expensive orange truck purchased by Evans. Thus, Neville boasted, they "owned" a fully equipped stolen truck with a legitimate identification number and bill of sale. At trial the true owner of the red truck positively identified his custom camper modifications and wiring installed on the truck before it was stolen. Thus, as to the first count in the indictment, there was adequate evidence for the jury to identify the truck as stolen, to find that even rebuilt it retained enough original major parts to remain a statutory "motor vehicle," and to conclude that Neville knew it was stolen.

The second count of the indictment identified a maroon 1972 Ford pickup containing a V-8 engine. Its coded serial number, however, also represented a different truck—a green 1971 Ford pickup with a smaller engine salvaged to

Neville after being wrecked in a fatal collision in 1972. Harold Stewart identified the maroon 1972 Ford pickup as one he had stolen for Neville from an Illinois Ford dealer in September, 1972, and delivered to Neville after removing and destroying its marked frame and identifying numbers. Thus, as to the second count, there was sufficient evidence for conviction.

In sum, as to both counts there was ample evidence from which the jury could find that Neville, an experienced and successful purveyor and fence of stolen trucks and major truck parts, knowingly transported stolen vehicles in interstate commerce. The evidence against the defendant is equally persuasive and damaging on the other five counts.[6]

III. Neville also challenges the court's instruction permitting the jury to conclude that he knew the vehicles were stolen by virtue of the inference raised by his unexplained possession of the recently stolen property. The Government offered proof that defendant Neville employed parts from salvage vehicles to camouflage and title stolen trucks for resale. Neville's explanation was that he legitimately rebuilt wrecked trucks and claimed not to have known the trucks he sold were stolen. The court instructed the jury that possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which

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[6] Because we find the evidence of Neville's guilt sufficient to support the aggregate ten year sentence on counts one and two, and because the sentences passed on counts three through seven are effectively concurrent with those of the first two, it is unnecessary for us to consider the sufficiency of the evidence relating to the remaining counts. *Barnes* v. *United States,* 412 U.S. 837, 848 n. 16 (1973); *United States* v. *Leach,* 429 F.2d 956, 960 (8th Cir. 1970), *cert. denied,* 402 U.S. 986 (1971); *see Benton* v. *Maryland,* 395 U.S. 784, 788-90 (1969).

one may reasonably infer that the person in possession knew the property was stolen, but that no such inference can be drawn if the possession is explained in a manner consistent with the defendant's innocence.[7]

We have recognized the evidentiary rule permitting such an inference as "factually sound and necessary." *Aron* v. *United States,* 382 F.2d 965, 970 (8th Cir. 1967). The instruction was a correct statement of the law, *see Earnhart* v. *United States,* 417 F.2d 547 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1068 (1970), properly given in the instant circumstances. *Harding* v. *United States,* 337 F.2d 254, 256 (8th Cir. 1964).

IV. At trial Neville objected to testimony by state police officers describing the proper Illinois and Missouri procedures for affixing vehicle identification plates onto rebuilt trucks on the ground that the challenged testimony, by inference, accused Neville of violating state registration procedures, another crime. We find no error in the admission of the evidence. The testimony was not calculated to infer that the defendant committed another crime but was relevant to the jury's understanding of the crime charged. Rule 401, Fed. R. Ev.;[8] *Babb* v. *United States,* 351 F.2d 863, 867 (8th Cir. 1965). Furthermore, the defendant proceeded to develop the matter more extensively in his cross-examination of one of the officers and cannot now be heard to complain that the Government led the jury

[7] The challenged instruction is substantially similar to that approved in *Barnes* v. *United States,* 412 U.S. 837, 840 n. 3 (1973).

[8] Although the Federal Rules of Evidence, Pub. L. No. 93-595 (Jan. 2, 1975), are not effective until July 1, 1975, we feel it appropriate to cite them as a primary source of evidentiary rules where not contrary to caselaw.

astray by first mentioning it. Moreover, the defendant failed to object to being cross-examined by the Government as to his own knowledge of the lawful identification procedures.

His objection to being cross-examined regarding threats made against government witness Stewart and Stewart's alleged admission of perjury is similarly without merit. It also passed without defense objection at trial and merely developed material which was introduced by the defendant in his direct testimony. It was relevant for his impeachment, Rule 611(b), Fed. R. Ev.; *United States* v. *Olsen,* 487 F.2d 77, 82 (8th Cir. 1973), *cert. denied,* 415 U.S. 993 (1974), and was well within the discretionary limits for cross-examination. *United States* v. *Vaughn,* 486 F.2d 1318, 1321-22 (8th Cir. 1973).

V. The defendant argues that the warrantless seizure of the four consigned trucks from the St. Louis auction by Sergeant Mudd of the Missouri State Highway Patrol on April 20, 1973, was unreasonable and violated his Fourth Amendment rights. He does not, however, challenge the officer's initial inspection of the trucks at the auction. We find Officer Mudd's subsequent seizure of the trucks to have been reasonable, based upon probable cause to believe that they were stolen, and find no error in the admission of evidence developed from them.

Neville surrendered possession of the trucks to the auction for public sale and "assumed the risk" of official examination. *Frazier* v. *Cupp,* 394 U.S. 731, 740 (1969). As previously noted, the auction company guaranteed title to all vehicles it sells and reserved the right to inspect the trucks before selling them. It therefore had requisite control over the vehicles to request official inspection and to

consent to their search. Thereafter, Officer Mudd's seizure of the vehicles was reasonable under the circumstances revealed by the officer's unchallenged initial inspection. *Cf. Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). The trucks' federal safety stickers and identification plates were loose and appeared not to have been factory attached; there were discrepancies between the trucks' actual engines, options and color characteristics and the characteristics described by their coded serial numbers; the trucks seized were easily moveable and situated at a public auction; and the officer had a statutory duty to impound them.[9]

The defendant also challenges the admission of evidence of overheard telephone conversations consisting of testimony of government witness Stewart recalling telephone conversations he had with the defendant, government cross-examination of the defendant using transcripts of monitored telephone conversations, and testimony by a Decatur, Illinois, police officer reporting a telephone conversation between Stewart and the defendant that he overheard with Stewart's consent. The defendant argues that the officer

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[9] Mo. Rev. Stat. § 301.390 (1969) provides in pertinent part:

> 1. No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle • • • on which the original manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced, and no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle • • • having no manufacturer's number or other original number, or distinguishing number.
>
> 2. Every peace officer who has knowledge of a motor vehicle • • • the number of which has been removed, covered, altered, destroyed or defaced, and for which no special number has been issued, shall immediately seize, [and] take possession of such motor vehicle • • •.
>
> • • •

violated the Illinois anti-eavesdropping statute, Ill. Rev. Stat. ch. 38, §§ 14-1 and 14-2 (1973), in overhearing the conversation, and that admission of any of the telephone evidence was constitutionally improper. The transcripts of the conversations, however, were not admitted into evidence.

We find no error in the admission of any of the evidence of telephone conversations between defendant Neville and government witness Stewart. Gathering evidence by overhearing a telephone conversation with the consent of one party does not violate the other party's Fourth Amendment rights. *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion). Misplaced expectations of confidence or trust in an accomplice are not constitutionally protected. *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966). Moreover, wiretap or other evidence obtained without violating the Constitutional or federal law is admissible in a federal criminal trial even though obtained in violation of state law.[10] *On Lee* v. *United States*, 343 U.S. 747, 754-55 (1952); *United States* v. *Keen*, 508 F.2d 986, 989 (9th Cir.), *petition for cert. filed*, 43 U.S.L.W. 3374 (U.S. Dec. 26, 1974) (No. 74-806).

The judgments of conviction are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[10] We intimate no view of the propriety of the Decatur, Illinois, police officer's conduct under state law.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1708 September Term, 1974

THE UNITED STATES, *Appellee,*

vs.

CLARENCE E. NEVILLE, *Appellant.*

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant, and being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 11, 1975

APPENDIX C

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

June 17, 1975

Robert C. Tucker, Clerk

Mr. Edward M. Genson
134 North LaSalle Street, Suite 306
Chicago, Illinois 60602

Mr. Theodore F. Schwartz
7701 Forsyth
Clayton, Missouri 63105

Hon. Donald J. Stohr
U.S. Attorney
St. Louis, Missouri

Mr. William D. Rund, Clerk
U.S. District Court
St. Louis, Missouri

Re: No. 74-1708. The U. S. v. Neville.

Dear Sirs:

Enclosed herewith to each of you is copy of order entered by us today in the above case at the direction of the Court.

Very truly yours,
/s/ Robert C. Tucker,
Clerk

eh
enc.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1708 September Term, 1974

THE UNITED STATES,
Appellee,

vs.

CLARENCE E. NEVILLE,
Appellant.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Federal

18 U.S.C. § 2311:

Definitions

As used in this chapter:

"Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air;

"Cattle" means one or more bulls, steers, oxen, cows, heifers, or calves, or the carcass or carcasses thereof;

"Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof;

"Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails;

"Securities" includes any note, stock, certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;

"Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof;

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.
June 25, 1948, c. 645, 62 Stat. 805; Oct. 4, 1961, Pub.L. 87-371, 75 Stat. 802.

18 U.S.C. § 2312:

Transportation of stolen vehicles

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
June 25, 1948, c. 645, 62 Stat. 806.

18 U.S.C. § 2516(2):

Authorization for interception of wire or oral communications

• • •

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs,

or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

18 U.S.C. § 2518(7):

Procedure for interception of wire or oral communications

• • •

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents

of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

18 U.S.C. § 3231:

District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

June 25, 1948, c. 645, 62 Stat. 826.

State

Illinois Revised Statutes,
Chapter 38, §§ 14-1(b), 14-2(a) and 14-4:

14-1. *Definition.*]

• • •

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

• • •

14-2. *Elements of the Offense.*] A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so with the consent of any one party to such conversation and at the request of a State's Attorney; or

• • •

14-4. *Sentence.)* Eavesdropping is a Class A misdemeanor.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

[*Note*: Legislation in Illinois has been introduced to increase the classification to a *felony*.]

Missouri Revised Statutes,
Section 301.390:

"1. No person shall sell, or offer for sale, or shall own or have the custody or possession of a motor vehicle, trailer or motor vehicle tire on which the original manufacturer's number or other distinguishing number has been destroyed, removed, covered, altered or defaced, and no person shall sell, offer for sale, own or have the custody or possession of a motor vehicle or trailer having no manufacturer's number of other original number or distinguishing number.

"2. Every peace officer who has knowledge of a motor vehicle, trailer or motor vehicle tire, the number of which has been removed, covered, altered, destroyed or defaced, and for which no special number has been issued, shall immediately seize, take possession of such motor vehicle, trailer or motor vehicle tire, arrest the supposed owner or custodian thereof, and cause prosecution to be begun in a Court of competent jurisdiction."

Supreme Court, U. S.
FILED
AUG 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-56

CLARENCE EDWARD NEVILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-56

CLARENCE EDWARD NEVILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This Supplemental Petition addresses the point and argument raised in pages 11-14 of the Petition (Point I) and is necessitated by the Seventh Circuit's issuance of an important opinion that conflicts directly with the Eighth Circuit's opinion in Petitioner's case.

I.

THE DISTRICT COURT'S INSTRUCTION, PERMITTING THE JURY TO FIND PETITIONER GUILTY OF TRANSPORTING STOLEN VEHICLES IF THE "MAJOR PARTS" OF A STOLEN VEHICLE WERE FOUND TO HAVE BEEN COMBINED WITH PARTS OF ONE OR MORE OTHER LEGITIMATELY ACQUIRED MOTOR VEHICLES INTO ONE REBUILT MOTOR VEHICLE, IS PREJUDICIAL ERROR WHERE:

(A) THE DISTRICT COURT REFUSED TO DEFINE, IN ANY MANNER, THE TERM "MAJOR PARTS";

(B) THE INSTRUCTION, GIVEN THE CIRCUMSTANCES OF THIS CASE, PERMITTED THE JURORS TO CONVICT PETITIONER EVEN IF THEY BELIEVED HIS THEORY OF INNOCENCE, BECAUSE OF THE LACK OF GUIDELINES AS TO WHAT CONSTITUTES "MAJOR PARTS" OF A MOTOR VEHICLE;

[(C) THE INSTRUCTION GIVEN IN THIS CASE CONFLICTS SQUARELY WITH THE LAW OF OTHER CIRCUITS.]

In its very recent opinion, [*United States v. Shanks*, No. 74-1697 (7th Cir. slip op., July 8, 1975) (appended hereto)] the Seventh Circuit has ruled in *direct conflict* with the Eighth Circuit opinion from which Petitioner seeks relief. The Seventh Circuit relied upon the Sixth Circuit's opinions in two cases entitled *United States v. Bishop*, 434 F. 2d 1284 (6th Cir. 1970); 437 F. 2d 97 (6th Cir. 1971).

Although the Seventh Circuit apparently was not apprised of the Eighth Circuit opinion below, the *Shanks* decision reflects a thorough, careful analysis of the prior decisions of other Circuits concerning which parts, if any, constitute a "motor vehicle" within the intendment of the Dyer Act.

The Seventh Circuit, in *Shanks*, reversed a Dyer Act conviction for receiving a stolen motor vehicle, holding that the evidence showed only that defendant Shanks received certain stolen parts of a tractor trailer which were assembled, with a lawfully obtained "glider kit" (front axle, cab and frame), into a single truck. *The stolen parts in Shanks included the engine, transmission and double axle rear end.* The allegedly stolen parts in Petitioner's case below were of a nature far less "major", as demonstrated by the Table that appears on page 7 of the Petition (reproduced on the following page). Despite the "major" nature of the *Shanks* parts, the Seventh Circuit found the instruction permitting the jury's verdict of guilty to be *plain error*, in view of the failure of the evidence to satisfy the statutory definition.

Given the Sixth and Seventh Circuit law holding that parts do not constitute a self-propelled motor vehicle and requiring appropriate instructions, the conflicting Eighth Circuit law[1] places Petitioner, a salvage parts

[1] The Eighth Circuit below held that to instruct the jury concerning the quantum and nature of stolen parts necessary to constitute the Dyer Act violation of transporting a motor vehicle would "confuse the jury." The Sixth Circuit, in *United States v. Wallace*, 254 F. Supp. 653 (E.D. Tenn. 1965), aff.d 361 F. 2d 494 (6th Cir. 1966), and the two *United States v. Bishop* cases, *supra*, requires an explicit, careful instruction that provides that it is necessary for a motor vehicle to have an engine, frame and wheels. With the Seventh Circuit's *Shanks* decision, the prejudicial impact of the Eighth Circuit's holding is exacerbated.

Truck	Parts Identified	PARTS WITNESSES TESTIFIED THEY WERE *UNABLE TO IDENTIFY*
COUNT 1	Improperly closing door, drilled holes, wiring, left taillight, smudge on door, child's boat (Tr. 822-23).	Engine, differential, steering mechanism, brakes, front suspension, rear end, frame, bumper (Tr. 479, 824-34).
COUNT 2	Repainted cab top (Tr. 493-94).	Engine, frame (Tr. 495-97).
COUNT 3	Drilled holes, alternating back-up lights, tailpipe extension, horn wire and hole, front seat stain, a shock absorber, dents and scratches (Tr. 868-72).	Engine, transmission, steering wheel, brake and drum assembly, suspension unit, front end springs, air conditioner compressor, tires, wheels, frame, bumper (Tr. 635-40, 877-90).
COUNT 4	A piece of tape, tailpipe modification, strip of caulking on door, paint on bumper, creosote in bed, dents (Tr. 904-07).	Engine, transmission, differential, steering unit, suspension unit, front end housing, rear end, wheel housing, wheels, tires, frame (Tr. 643-45, 905-19).
COUNT 5	Filled dent in hood, drilled holes, missing seat belt emblems, glue on dashboard, hood discoloration, key for glove compartment, drug store receipt (Tr. 922-27).	Engine, differential, steering wheel, brake drums, springs, front end assembly, top of the cab, rear end, wheel housing, grill work, frame, bumper (Tr. 434-36, 922-46).
COUNT 6	Wax under hood, tailgate insulation, wiring on underside of hood, holes in bed rail, scratches on tailgate, paint on dash (Tr. 957-61).	Engine, transmission, differential, steering wheel, power steering unit, brake assembly, power brake unit, front end assembly, rear springs, rear end, compressor, wheels, wheel housing, tires, frame, radio (Tr. 660-66, 960-73).
COUNT 7	Drilled holes in bed and side of cab, dash and step bumper, worn spot on hood, wiring on sunvisor, turned antenna (Tr. 976-88).	Engine, transmission, power brake unit, brake assembly, drum housing, brakes, front end assembly, front springs, leaf springs, air conditioner, frame, tires (Tr. 672-77, 990-95).

dealer and rebuilder, in a position best illustrated by the map below:

FEDERAL CIRCUITS
(28 U.S.C. 41)

Petitioner's place of business, Neville Auto Parts, is located in central Illinois. He buys and sells used parts and rebuilt vehicles on a nationwide scale. Assuming his most immediate business area to be states surrounding Illinois, it can be seen that the conflict between the Circuits carries with it marked consequences. For instance, had Petitioner offered the rebuilt trucks in question for auction in Indiana, Kentucky, Michigan or Wisconsin (all surrounding states in which Petitioner conducts business), no Dyer Act violation would have been com-

mitted under the law of the Sixth and Seventh Circuits.[2] In surrounding states Iowa or (as is the case) Missouri, Petitioner stands convicted and sentenced to ten years imprisonment and a $35,000 fine.

It is precisely this type of conflict that presents sound reason for grant of Certiorari. The conflict occasions confusion, uncertainty and prejudice and calls out for resolution by this Court.

CONCLUSION

For the reasons presented in the Petition and this Supplement thereto, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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[2] In that Circuit Judge Doyle, of the Tenth Circuit, was a member, by designation, of the Seventh Circuit *Shanks* panel, the Tenth Circuit as well may follow the Sixth and Seventh Circuit reasoning.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1697

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DONALD WAYNE SHANKS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division, No. IP 74-42-CR, JAMES E. NOLAND, *Judge.*

ARGUED APRIL 21, 1975 — DECIDED JULY 8, 1975

Before SWYGERT, STEVENS and DOYLE,* *Circuit Judges.*

DOYLE, *Circuit Judge.* Shanks was convicted of receiving, concealing and storing a stolen motor vehicle, a White semi-tractor, knowing the same to have been stolen, contrary to 18 U.S.C. § 2313. Shanks' co-defendant, Louis Horton, was also convicted, but the appeal is that of Shanks only.

A tandem axle tractor was stolen on August 24, 1973 from the White Truck factory branch at Cincinnati, Ohio. In early October 1973, Horton received a call from an unidentified person asking if he was interested in buying some equipment. Horton and Shanks were in the

* Circuit Judge William E. Doyle of the Tenth Circuit is sitting by designation.

process of setting up a business, S & H Transport, and had been looking at wrecked trucks for about two years. Horton agreed to look at the equipment and met the caller at a truck stop in Logansport, Indiana. The man showed him the engine, transmission and a few other parts of a truck. These items were in the bed of another truck. Horton agreed to buy the "equipment" after viewing it. That evening, the man delivered the engine, transmission and the double axle rear end to Horton. The latter paid $3800 in cash. He received no bill of sale or other document evidencing the sale. On the same night or a few days later, Horton showed the parts to Shanks who agreed to pay his share of the price. They then arranged to buy a glider kit (front axle, cab and frame), into which the parts would be placed. This purchase was from a friend of Shanks, Wyman Kinderman. Kinderman knew a mechanic who was willing and able to install the parts in the kit. Arrangements were thereafter made through Kinderman with James Summers, in Lebanon, Indiana, to assemble the truck. Kinderman had the glider kit delivered to Summers; Horton brought the parts to Summers sometime in November. Summers started the assembling of the truck, but became suspicious because the engine looked newer than Horton had indicated. As a result, Summers contacted his attorney, who in turn contacted the FBI. The day after the FBI was contacted, on January 23, 1974, Agent Valentine went to Summers' shop. The engine, transmission and rear end were identified as parts of the tractor stolen in Cincinnati in August. The remainder of the original White truck has not been found. Nor has the person who sold the parts to Horton been identified or found.

Shanks raises two questions on appeal:

1) Whether the White truck parts constituted a motor vehicle within the meaning of 18 U.S.C. §§2311 and 2313; and

2) Whether the evidence was sufficient to support his conviction.

Did the parts which were purchased constitute a motor vehicle within the meaning of the statute, 18 U.S.C. § 2313? It makes it unlawful to receive, conceal or store a

motor vehicle which is a part of or which constitutes interstate commerce knowing it to have been stolen. Section 2311 defines a motor vehicle as including "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails."

The trial court instructed the jury as to the statutory definition of a motor vehicle and then stated:

> You are further instructed that the purpose of the statute which these defendants are charged with violating is to eliminate the interstate traffic in stolen motor vehicles. This purpose cannot be frustrated by the dismantling of the parts of a motor vehicle which has been stolen. Thus, if you find beyond a reasonable doubt that the truck involved was stolen, the fact that it was dismantled and was no longer in the same precise condition as when it was stolen does not destroy its characterization as a motor vehicle.

The government relies on United States v. McKlemurry, 461 F.2d 651 (5th Cir. 1972) and United States v. Wallace, 254 F. Supp. 653 (E.D. Tenn. 1965), *aff'd*, 361 F.2d 494 (6th Cir. 1966). The court in *McKlemurry* rejected defendant's argument that the vehicle involved was not a motor vehicle within the meaning of the act merely because as of the time the car was recovered by the police it had no motor. The court said, "To allow car thieves to escape prosecution by the simple device of removing the car's engine would eviscerate the Act and frustrate the intent of Congress." 461 F.2d at 653.

In *Wallace*, the defendant had purchased a wrecked automobile in Tennessee and had combined major parts of that car with major parts from a car stolen in Georgia. The rebuilt car was then sold. The trial court instructed the jury that it was necessary for a vehicle to have an engine, frame and wheels, and that the body alone could not constitute a motor vehicle. But it then went on to instruct that if major parts of the car defendant sold had been stolen, it was no defense that some of the parts were not stolen parts. The Sixth Circuit affirmed this without opinion.

The opinion in *Wallace* fails to make clear whether defendant was charged with transportation of a stolen vehicle under § 2312 or sale or receipt under § 2313. Nor does this decision bring out whether the defendant at any time had possession of the entire vehicle from which the stolen parts were obtained.

United States v. Bishop, 434 F.2d 1284 (6th Cir. 1970) is more authoritative. In that case the Sixth Circuit discouraged the reading of *Wallace* too broadly. In *Bishop,* and in a companion case, United States v. Bishop, 437 F.2d 97 (6th Cir. 1971), in which the first *Bishop* defendant's brother was involved, the court held that transportation or receipt or concealment of one part of a motor vehicle did not constitute a violation of the Dyer Act. In the *Bishop* cases a car had been stolen in Ohio on March 2, 1969. On March 21, 1969, the engine block was found in Kentucky in the home of Johnny Bishop and his father. The chassis was found, burned, about three miles away from the farm. In each case the court found possession of the engine block alone insufficient to justify conviction for transportation or receipt of a stolen "motor vehicle." But the presence of the burned chassis only three miles away provided information from which the jury could reasonably infer that one brother had transported and the other had received the whole vehicle.

Here, unlike in the *Bishop* cases, there is a lack of evidence that defendants received anything but the parts. There is a dearth of evidence that the tractor as a unit ever crossed state lines.

In the first *Bishop* case it was held that the basic inference from the facts present was sufficient to establish the elements of the offense there charged. Thus, there existed a more or less whole vehicle which was in the actual and constructive possession of the accused. It cannot be said from the evidence that defendant possessed a motor vehicle. The deductive process cannot be stretched far enough to allow a jury to infer that the appellant received a stolen motor vehicle. The government's own evidence established at most that the defendant had received certain parts. Accordingly, it would be highly improper to indulge the inference which arises from possession of stolen property.[1]

We are cognizant that the federal courts have tended to construe the Dyer Act in broad terms. *See* United States v. Turley, 352 U.S. 407 (1957).[2] Regardless of the breadth of interpretation, transportation or receipt of parts alone has not been held to be sufficient. The *Bishop* cases, *supra,* recognize this. At the same time, we make clear our position that a person cannot avoid prosecution and conviction by the simple subterfuge of taking a vehicle apart.[3]

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[1] The *Bishop* court said in part:
Similarly, the unexplained possession of a stolen vehicle in a state to which it has been recently transported is sufficient evidence upon which a jury may infer that the possessor participated in the interstate transportation of the vehicle. Rogers v. United States, supra; Prince v. United States, supra. And finally, the false explanation of possession of stolen property gives rise to similar inferences. Indeed, it has been held that "fabrication of evidence of innocence is cogent evidence of guilt." Harvey v. United States, 94 U.S.App.D.C. 303, 215 F.2d 330, 332 (1954); United States v. Reed, 414 F.2d 435, 438 (5th Cir. 1969); McIntosh v. United States, 341 F.2d 448, 457 (8th Cir. 1965); Koury v. United States, 217 F.2d 387, 388 (6th Cir. 1954).
434 F.2d at 1286-87.

[2] In *Turley* the Court held that "stolen" included all felonious takings with intent to deprive of ownership, whether or not the taking constituted common law larceny. The Court indicated that the statute should be given an interpretation consistent with Congressional policy to halt interstate traffic in vehicles stolen by any means.

[3] *See* United States v. Stettmeier, 465 F.2d 436 (9th Cir. 1972) (Defendant bought a plane, knowing it was stolen, replaced some of its vital parts and then transported it from New Mexico to Arizona. The court held it was sufficient to show that major parts of the plane were stolen.); United States v. Abigando, 439 F.2d 827 (5th Cir. 1971) (A car was stolen in New Orleans and recovered in Florida from a person who obtained it from defendant, and who said it had no engine when he received it. The defendant had, however, confessed to stealing the car in New Orleans and driving it to Florida. It was a "motor vehicle" at the time of transportation.); United States v. Sutt, 415 F.2d 1305 (7th Cir. 1969) (Defendant's conviction for receipt of a stolen vehicle was upheld where the evidence showed he sold the top and back of the car, the transmission was found in a witness's garage just after defendant had used it, and defendant acknowledged ownership of the engine to another witness).
Compare, United States v. Lofty, 455 F.2d 506 (4th Cir. 1972) (Defendant was convicted for receiving a motor vehicle and for receiving stolen goods. The "goods" consisted of the trailer coupled to the truck tractor received by defendant. The court said the trailer was not part of the motor vehicle because it was not self-propelled.); *United States v. Wooten,* 239 F. Supp. 123 (E.D. Tenn. 1965) (Defendant could not be convicted under the Dyer Act where he put the body alone of a stolen car on the frame of a legitimately purchased car. The body alone cannot be a motor vehicle.)

The government also complains that the defendant-appellant failed to raise this issue at trial and failed to object to the instructions as well. The government asserts that this constitutes a waiver. We recognize that failure to object to instructions bars the appellant from raising objections on appeal. Rule 30, Fed. Rules Crim. Proc. But where an error is plain, notice may be taken of it under Rule 52, and the failure of the evidence to satisfy the statutory definition here is of sufficient plainness and magnitude to justify its now being considered.

In sum, then: appellant was indicted for receiving and concealing a White semi-tractor, knowing it to have been stolen. The evidence showed only receipt of certain parts of the stolen tractor. It was undisputed that the parts alone did not constitute a self-propelled vehicle. There was no showing of the receipt or concealment of a motor vehicle as defined by the statute.

Defendant also argues that the evidence was insufficient. We need not consider this question.

The judgment is reversed and the cause is remanded with instructions to dismiss the cause.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.